SERVED: October 24, 1996

NTSB Order No. EA-4490

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 7th day of October, 1996

TODD S. PETERSEN, Applicant v. David R. Hinson, Administrator, Federal Aviation Administration, Respondent.	)	Docket 222-EAJA-SE-14007

OPINION AND ORDER

The Administrator has appealed the Decision and Order of Administrative Law Judge Patrick G. Geraghty served on July 18, 1995, granting applicant $6,919.91 in attorney fees and other expenses under the Equal Access to Justice Act (EAJA, 5 U.S.C. § 504).[1] For the reasons discussed below, the Administrator's appeal, to the extent it seeks reversal of the EAJA award, is

[1]A copy of the law judge's decision is attached.

denied. The appeal is granted to the extent it seeks a reduction in the award of fees and expenses to exclude fees that were incurred before the Administrator's complaint was filed.

The underlying action for this EAJA appeal involved a March 8, 1995 Emergency Order of Revocation issued by the Administrator revoking applicant's airman mechanic certificate. The revocation order resulted from a random drug test of applicant initiated by his employer, Northern Air Cargo, that occurred on September 22, 1994. Test results showed that the urine samples provided by applicant were adulterated by a surfactant, i.e., a soap or detergent. The Administrator alleged that applicant adulterated the test samples, in effect constituting a refusal to take the drug test in violation of 14 C.F.R. § 65.23(b) of the Federal Aviation Regulations (FAR).[2]

The Administrator called as a witness Ronald Jordan, who had collected the urine samples on the date in question. Mr. Jordan

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[2]FAR section 65.23(b) reads as follows:

§ 65.23, Refusal to submit to a drug test,

* * *

(b) Refusal by the holder of a certificate issued under this part to take a test for a drug specified in appendix I to part 121 of this chapter, when requested by an employer as defined in that appendix or an operator as defined in §135.1(c) of this chapter, under the circumstances specified in that appendix is grounds for-

(1) Denial of an application for any certificate or rating issued under this part for a period of up to 1 year after the date of that refusal; and

(2) Suspension or revocation of any certificate or rating issued under this part.

arrived at applicant's place of employment at approximately 5:00 o'clock in the evening. He testified as to the collection procedure. These steps included instructing the donor to wash and dry his hands before providing the urine sample. A sealed plastic collection kit is selected that contains, among other things, two specimen bottles. The plastic bag containing the collection kit is unsealed in the donor's presence. Mr. Jordan indicated that, if the plastic seal was broken prior to being opened in the donor's presence, it would not be used. At Northern Air Cargo, the donor then goes to a collection area, in this case a restroom, where he provides the urine sample in private. The donor then returns a split sample of urine contained in the two specimen bottles. Mr. Jordan had no specific recollection of interacting with applicant on September 22, 1994.

Dr. David Kuntz, Director of Northwest Toxicology in Salt Lake City, Utah, also testified for the Administrator. His laboratory determined that the sample provided by applicant had been adulterated by a surfactant. He testified that in his opinion there was a substantial amount of soap present, much more so than may have been caused by an inadvertent attempt, or unknowing exposure, or contamination of the subsample, such as urinating over your hand or fingers. He testified further that there existed a commercial adulterant called Mary Jane Super Clean 13. It was sold for $30 in little vials about the size of his small finger. Soap or detergent would render the specimen

untestable for marijuana.

Applicant stipulated to his urine samples being adulterated by a surfactant, but denied that he had any knowledge as to how the surfactant got there. As to the collection process, applicant said that he was provided two bottles for the urine sample. But unlike the testimony of Mr. Jordan, he testified that the bottles were sitting on a table. They did not come from a sealed kit. He noted further that Mr. Jordan did not instruct him to wash his hands prior to providing the sample. Applicant went to the collection area where he then provided the urine samples. Applicant denied putting any adulterant into his urine specimens. He denied having any knowledge of Mary Jane 13 at the time he provided his test samples.

Applicant called as witnesses two co-workers who were also tested that day. Like applicant, they testified that the specimen bottles provided to them were sitting on a table in front of Mr. Jordan, not sealed in a plastic bag. They also indicated that he did not instruct them to wash their hands prior to providing their urine specimens.

Following the evidentiary portion of the hearing, the law judge found that the Administrator had failed to prove by preponderant evidence that applicant had knowingly adulterated his urine specimens. By finding credible the testimony of applicant and his two co-workers, the law judge concluded that the collection process was done in a manner susceptible to the introduction of a contaminant by a means for which applicant was

not responsible. He surmised that Mr. Jordan, at the end of a busy day, may have speeded up the collection process in a manner as testified to by applicant and his two co-workers.

In granting applicant's subsequent request for EAJA fees, the law judge essentially found that the Administrator failed to properly evaluate the strength of his case as, prior to the issuance of the emergency order of revocation, applicant and his two co-workers had submitted statements reflecting their later hearing testimony and contradicting the generalized testimony of Mr. Jordan. The law judge concluded that the Administrator was not substantially justified in commencing the action against applicant. The law judge proceeded to compute the EAJA award, reducing the amount only by capping the hourly rate, as required by our rules (49 C.F.R. 826.6).

The Administrator contests the law judge’s finding that he was not substantially justified in bringing the complaint and also argues that, if an EAJA award is issued, it should be reduced by that amount incurred before the complaint was filed with the Board. Applicant, should an award be upheld, also seeks supplemental fees in the amount of 10 hours’ attorney’s fees for preparing applicant’s reply to the Administrator’s response before the law judge and the reply here. We address the substantial justification issue first.

EAJA requires the government to pay to the prevailing party certain attorney fees and costs unless the government establishes that its position was substantially justified, or that special

circumstances would make an award of fees unjust. 5 U.S.C. 504(a)(1). For the Administrator's position to be found substantially justified, it must be reasonable in both fact and law, i.e., the facts alleged must have a reasonable basis in truth, the legal theory propounded must be reasonable, and the facts alleged must reasonably support the legal theory. Application of U.S. Jet, NTSB Order No. EA-3817 at 2 (1993); Pierce v. Underwood, 487 U.S. 552, 565, 108 S.Ct. 2541 (1988). This standard is less stringent than that applied at the merits phase of the proceeding, where the Administrator must prove his case by preponderance of the reliable, probative, substantial evidence. Accordingly, the Administrator's failure to prevail on the merits does not preclude a finding that its position was nonetheless substantially justified under the EAJA.

On appeal, the Administrator argues that he was substantially justified in relying on the testimony of Mr. Jordan in bringing the complaint and that this was reasonable in fact. The Administrator notes that the underlying decision hinged on the law judge’s credibility determination and that the Administrator is substantially justified in fact in bringing a credibility determination before the Board for decision.

We agree. When key factual issues hinge on witness credibility, the Administrator is substantially justified -- absent some additional dispositive evidence -- in proceeding to hearing where credibility judgments can be made on those issues. Caruso v. Administrator, NTSB Order No. EA-4615 at 9 (1994).

Substantial justification for the FAA's position cannot be found lacking simply because the law judge discredited the testimony of a particular witness. See, e.g., Conahan v. Administrator, NTSB Order No. EA-4276 (1994) ("[T]he Administrator was substantially justified in pursuing the case so that appropriate credibility judgments could be made"), and Martin v. Administrator, NTSB Order No. EA-4280 (1994).

Nevertheless, we do not find this to be the dispositive issue in **this** proceeding. Preliminary to the credibility issue is the question of the reasonableness of the Administrator's investigation prior to filing the complaint, as this matter is directly relevant to whether the Administrator was substantially justified -- had a reasonable basis in truth -- in bringing the action.

Prior to issuance of the complaint, applicant had provided the FAA his statement, and statements of two fellow mechanics subject to urine testing that same day. See attachments to applicant's EAJA Application. These statements indicated that the prescribed collection procedures had not been followed and, as a result, suggested that applicant's test samples may have been inadvertently contaminated by soap. The Administrator did not pursue this line of inquiry and did not interview applicant's co-workers regarding the matter, despite the general, non-incident-specific content of Mr. Jordan's testimony.

While we might not have the same view had this issue arisen in another context (and to comment generally would be merely

dicta), we view government imposition of drug testing programs and government use of drug testing results to carry a special, heightened obligation. That obligation is not fulfilled where contradictory or controversial testimony is summarily and unilaterally discounted as unreliable. This reaction is of special concern when applicant had submitted to the FAA results of a drug analysis taken 2 weeks earlier indicating negative results. Initial decision at footnote 2.

Accordingly, in cases involving drug tests and the implications to certificate holders of positive or contaminated test results, it is our view that, to be substantially justified in proceeding, the Administrator must investigate all reasonable avenues offered by a respondent, and that the written statements of two co-workers, notably in view of applicant’s prior negative test, were such reasonable avenues for which inquiry should have been made.

Having found that the Administrator's position in pursuing this enforcement case was not substantially justified, in that it did not have a reasonable basis in fact, and that applicant otherwise qualifies for an EAJA award, we proceed to determine the amount of that award. The Administrator is correct in arguing that fees and expenses incurred prior to the filing of the Administrator’s complaint with the Board may not be the subject of an award here. Barth v. Administrator, NTSB Order No.3833 (1993) (EAJA applies only to “adversary adjudications” under 5 U.S.C. 554 (the Administrative Procedure Act);

consultation and settlement meeting process is not a section 554 on-the-record hearing).[3]

The additional 10 hours' fees sought by applicant are reasonable for the work performed. Those fees shall be calculated at $122.28 per hour in the absence of argument from applicant regarding use of a later figure.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted in part and denied in part; and

2. The initial decision awarding $6,919.91 in attorney fees and expenses is amended to add $1223, but to subtract fees and expenses incurred in advance of the Administrator's filing of his complaint with the Board.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

[3] This result is not inconsistent with EAJA. That act was not intended to reimburse for all expenses incurred. See, e.g., Application of Cross, NTSB Order No. EA-3601 (1992).